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No. 409

In the Supreme Court of the United States

OCTOBER TERM, 1957

WILLIAM G. BARR, PETITIONER

v.

LINDA A. MATTEO AND JOHN J. MADIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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LINDA A. MATTEO AND JOHN J. MADIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of William G. Barr, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cases on May 2, 1957.[1]

OPINIONS BELOW

The United States District Court for the District of Columbia rendered no opinion. The opinion of the

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[1] Petitioner has been represented by the Department of Justice throughout this proceeding pursuant to 5 U. S. C. 309. See *Booth* v. *Fletcher*, 101 F. 2d 676 (C. A. D. C.), certiorari denied, 307 U. S. 628.

The cases were consolidated on appeal by order of the Court of Appeals of March 26, 1956, because of the identity of the factual and legal issues. A single petition is filed in accordance with Rule 23 (5) of the rules of this Court.

Court of Appeals, as modified by its order of June 6, 1957 (App., *infra*, pp. 16–24, 26–27), is reported at 244 F. 2d 767.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1957 (App., *infra*, p. 25). A timely petititon for rehearing *in banc* was denied on June 6, 1957 (App., *infra*, p. 28). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the absolute immunity from defamation suits, accorded officials of the Government with respect to acts done within the scope of their official authority, extends to statements to the press by high policy-making officers, below cabinet or comparable rank, concerning matters committed by law to their control or supervision.

STATEMENT

This is a libel suit instituted by respondents, former employees of the Office of Rent Stabilization, against petitioner, who was the Acting Director of that Office, based on matters contained in an official press release issued by the latter on February 5, 1953. The press release related to a then current congressional inquiry concerning a terminal leave plan which had been devised by the respondents in 1950 for employees of the agency. The facts of the case may be summarized as follows:

1. *The terminal leave plan.* In May, 1950, reduction-in-force notices were issued to personnel of the Office of Housing Expediter, an independent exec-

utive agency and the predecessor of the Office of Rent Stabilization, since the agency's statutory existence was about to expire. Respondent Madigan, who was Deputy Director in charge of personnel and fiscal matters, and respondent Mattco, chief of the personnel branch, devised a plan which was designed to utilize $2,600,000, which had been earmarked in the agency's appropriation for the fiscal year 1950 exclusively for terminal leave payments, as a means of conserving funds for future operational needs should the agency's life be extended (R. 14, 17). The purpose of the plan was to avoid a large terminal leave carry-over into the next fiscal year which would have to have been paid out of the agency's general funds. Under the plan, employees of the agency would be terminated pursuant to the existing reduction-in-force notices, receive payment for accrued annual leave out of the terminal leave appropriations, be rehired the following day as temporary employees, and be restored to permanent status if the life of the agency were extended (R. 14–15, 17).

Petitioner, who was then General Manager of the Office of Housing Expediter, was opposed to the plan on the ground that it violated the spirit of the so-called Thomas Amendment to the General Appropriation Act, 1951, 64 Stat. 768, which required government employees to use their annual leave within a specified time and prohibited payments for unused annual leave accumulated during the calendar year 1950 (R. 15). The Housing Expediter decided against general adoption of the plan, but, when Mrs. Matteo advised him that some of the employees de-

sired to volunteer for it, he gave permission for the plan to be utilized by any such volunteers (R. 18, 19). On June 23, 1950, Congress extended the authority of the Office of Housing Expediter to June 30, 1951, and two days later the terminal leave plan was put into effect for forty-nine employees of the agency, including the respondents (R. 14, 18, 21).

2. *The press release.* On January 28, 1953, Senator John J. Williams of Delaware wrote to the Office of Rent Stabilization (successor to the Office of Housing Expediter) inquiring as to the 1950 terminal leave payments (R. 19–20). The letter came to the attention of respondent Madigan, who prepared a preliminary draft of a reply to Senator Williams defending the plan (R. 20). The draft was not brought to the attention of petitioner, who was at that time the Acting Director of the agency (R. 16, 20). The letter was prepared in final form and sent to petitioner's office for his signature, but in his absence his name was signed by the Director's secretary and the letter was delivered to Senator Williams on the morning of February 3 (*ibid.*).

The following day, Senator Williams on the floor of the Senate delivered a speech criticizing the 1950 terminal leave payments and requesting that the matter be investigated by a congressional committee (R. 3, 16). Senators Ferguson, Dirksen, and McCarthy joined in the denunciation of the leave payments as a "conspiracy to defraud the Government" and a "raid on the Treasury." 99 Cong. Rec. 868–71. These comments received wide publicity. See, *e. g.*, *The New York Times*, February 5, 1953, p. 18, col. 8.

On February 5, petitioner advised the respondents that because of the criticism of himself and the Office of Rent Stabilization, the adverse publicity, and the need to protect himself and safeguard the interests of the agency, he was going to take disciplinary action against them (R. 16, 20, 22). He thereupon served them with letters expressing his intention to suspend them on February 9, the date when his appointment as Acting Director became effective.[2] Contemporaneously, at petitioner's direction, the Office of Rent Stabilization issued the following press release which is the subject matter of this litigation:

> William G. Barr, Acting Director of Rent Stabilization, today served notice of suspension on the two officials of the agency who in June 1950 were responsible for the plan which allowed 53 of the agency's 2,681 employees to take their accumulated annual leave in cash.
>
> Mr. Barr's appointment as Acting Director becomes effective Monday, February 9, 1953 and the suspension of these employees will be his first act of duty. The employees are John J. Madigan, Deputy Director for Administration, and Linda Matteo, Director of Personnel.
>
> "In June 1950," Mr. Barr stated, "my position in the agency was not one of authority which would have permitted me to stop the action. Furthermore, I did not know about it until it was almost completed.

[2] Petitioner had been appointed Acting Director effective February 9, 1953, when the resignation of Director James Henderson was to become effective. When the press release was issued, petitioner was Acting Director by designation of Mr. Henderson who was then absent from Washington (R. 24).

"When I did learn that certain employees were receiving cash annual leave settlements and being returned to agency employment on a temporary basis, I sepecifically notified the employees under my supervision that if they applied for uch cash settlements I would demand thei" resignations and the record will show that my immediate employees complied with my request.

"While I was advised that the action was legal, I took the position that it violated the spirit of the Thomas Amendment and I violently opposed it. Monday, February 9th, when my appointment as Acting Director becomes effective, will be the first time my position in the agency has permitted me to take any action on this matter, and the suspension of these employees will be the first official act I shall take."

Mr. Barr also revealed that he has written to Senator Joseph McCarthy, Chairman of the Committee on Government Operations, and to Representative John Phillips, Chairman of the House SubCommittee on Independent Offices Appropriations, requesting an opportunity to be heard on the entire matter.

3. *The proceedings below.* Shortly after the issuance of the press release, this suit was brought, charging that the release was a malicious libel causing damage to respondents (R. 1–6). Petitioner's motion to dismiss the complaint on the ground of absolute privilege was overruled by the District Court on the authority of *Colpoys* v. *Gates*, 118 F. 2d 16 (C. A. D. C.) (R. 7). Petitioner then filed an answer (R. 8–9, 12–13), and a jury trial was held. After re-

spondents had submitted evidence in support of their claim of liability, petitioner moved for a directed verdict on the grounds of (1) truth, (2) no defamatory imputation, and (3) qualified privilege. This motion was denied. The court also denied a motion for directed verdict on the ground of absolute privilege. A jury verdict was returned in favor of respondents in the amounts of $6,500 and $2,000, respectively.

On appeal to the Court of Appeals for the District of Columbia Circuit, the sole issue raised by petitioner was whether the issuance of the press release was absolutely privileged (App., *infra*, pp. 18–20). Since any of the other possible grounds of appeal, if successful, would have resulted, not in an outright judgment for petitioner, but in a new trial, petitioner requested the Department of Justice to limit the appeal in this way so as to avoid the risk of a damage award larger than the one rendered and also to avoid the burden and effort of a second protracted trial.[3] At the request of the Court of Appeals, each party filed a memorandum on the question of whether the court could nevertheless consider the issue of qualified privilege. Upon reconsideration, petitioner advised the Department of his desire to have this question dealt with, and, accordingly, it was urged upon the Court of Appeals that it could properly consider

[3] The Government had no objection to this course of action since its effort over many years has been to have the defense of absolute immunity sustained, thereby barring the inception of defamation actions against government officials and avoiding the inevitable dangers and harassment of a lengthy trial.

the question under its Rule 17 (i), which provides that "the court, at its option, may notice and pass upon a plain error not pointed out or relied upon." The court concluded, however, that since the waiver was "informed and deliberate," the rule invoked on petitioner's behalf was not applicable and the decision would be confined to the issue of absolute privilege (App., *infra*, pp. 19–20).

On the merits, the court (Judge Danaher dissenting) affirmed the judgment against petitioner. The majority opinion (by Chief Judge Edgerton, with Judge Fahy concurring) recognized that petitioner's decision to suspend respondents "probably [was] within his general line of duty," but held that petitioner "in explaining his decision to the general public * * * went entirely outside his line of duty" (App., *infra*, pp. 17–18). The majority stated that "if the defendant had been a Cabinet officer, his public explanation might have been absolutely privileged" (App., *infra*, p. 18), but that in this respect the Acting Director of the Office of Rent Stabilization was not different from the United States Marshal involved in *Colpoys* v. *Gates*, 118 F. 2d 16 (C. A. D. C.). The majority subsequently modified their opinion to declare that the principle of absolute privilege was not necessarily limited to Cabinet officers but might include other officers who held comparable positions. (App., *infra*, pp. 26–27).

Judge Danaher, in dissenting (App., *infra*, pp. 20–24), stressed the fact that, as Acting Director of the Office of Rent Stabilization, petitioner had delegated to him all of the powers, duties, and functions

conferred on the President by Title II of the Housing and Rent Act of 1947, 61 Stat. 193. In Judge Danaher's view, the press release was no more than a declaration of policy by a policy-making executive with respect to a matter committed by law to his control or supervision.

REASONS FOR GRANTING THE WRIT

The holding in this case—that the issuance of an official press release by the head of an independent executive agency is not absolutely privileged—constitutes a departure from the consistent pattern of decisions of various courts of appeals according immunity to acts of government officers within the scope of their official authority. It conflicts with the principles of the ruling of this Court in *Spalding* v. *Vilas*, 161 U. S. 483, from which this pattern of lower court cases has developed. And its effect will be to hamper seriously the ability of policy-making officials below cabinet rank to engage in public discussion of the affairs of government although, given the present complexity of governmental operations, these officials must of necessity constitute the major source of information concerning public affairs. In addition, the opinion of the Court of Appeals, as amended, leaves the law in a state of uncertainty in an area which has become increasingly important and has not received the attention of this Court since its decision in *Spalding* v. *Vilas*, *supra*. For these reasons, we believe that the decision below merits further review.

1. In *Spalding* v. *Vilas*, this Court held that the head of an executive department was immune from

liability in defamation for public statements "having more or less connection with the general matters committed by law to his control or supervision." 161 U. S. at 498. The immunity was absolute so that, as long as making the statement was not unauthorized by law or beyond the scope of official duties, motive was immaterial. And in order to receive the protection of immunity, it was not necessary that the official be under a positive legal duty to act, but it was sufficient that general legal authority for the act existed. 161 U. S. at 498–99.

The principles of that decision were followed by the Court of Appeals for the District of Columbia Circuit with respect to official communications later publicized, *Mellon* v. *Brewer,* 18 F. 2d 168, certiorari denied, 275 U. S. 530, and with respect to press releases issued by department heads, *Glass* v. *Ickes,* 117 F. 2d 273, certiorari denied, 311 U. S. 718. But in *Colpoys* v. *Gates,* 118 F. 2d 16, that court held that a United States Marshal was outside his "general line of duty," and hence not privileged, in issuing a statement to the press with respect to the discharge of two of his deputies for alleged malfeasance. Since the Marshal was not a policy-making official, no public interest required that his public discussion of the matter be protected in this way. The court expressly left open the question, which it answered here, of whether the privilege of public discussion would extend to officers below cabinet rank who determine the policies to be pursued by the Government.

In nondefamation cases, and in defamation cases involving official communications between government

officials, the Court of Appeals did extend the cloak of immunity to relatively minor officials below the department head level. *Cooper* v. *O'Connor*, 99 F. 2d 135, certiorari denied, 305 U. S. 643; *Farr* v. *Valentine*, 38 App. D. C. 413; *De Arnaud* v. *Ainsworth*, 24 App. D. C. 167, appeal dismissed, 199 U. S. 616.[4] The court recognized that it is through these officials, under appropriate delegations of authority, that the business of government is carried on and that "[i]t is, therefore, not the particular position of the party making the report or communication that entitles it to absolute privilege so much as the occasion of making it, and the reasons of public policy for the immunity." *De Arnaud* v. *Ainsworth*, *supra* at 181.

It has also been recognized that, if the purpose of the rule of immunity is to be effectuated properly, the immunity must be absolute, and not merely qualified or conditional, so as to avoid the necessity of litigating such delicate questions of fact as proper motivation and reasonableness of conduct. *Gregoire* v. *Biddle*, 177 F. 2d 579, 581, (C. A. 2), certiorari denied, 339 U. S. 949; *Cooper* v. *O'Connor*, *supra* at 140. "* * * [T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most ir-

[4] See also *Taylor* v. *Glotfelty*, 201 F. 2d 51 (C. A. 6); *Love* v. *Snyder*, 184 F. 2d 841 (C. A. 6); *United States* v. *Brunswick*, 69 F. 2d 383 (C. A. D. C.); *Carson* v. *Behlen*, 136 F. Supp. 222 (D. R. I.); *Tinkoff* v. *Campbell*, 86 F. Supp. 331 (N. D. Ill.); *Harwood* v. *McMurtry*, 22 F. Supp. 572 (W. D. Ky.); *Miles* v. *McGrath*, 4 F. Supp. 603 (D. Md.).

responsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle, supra* at 581.[5]

2. In the instant case, the Court of Appeals has refused to apply these principles to statements to the press by high policy-making officials below cabinet or comparable rank. We submit that there is no rational basis for so limiting the applicability of the immunity rule. While the correctness of the decision in *Colpoys* v. *Gates* and the standard there applied is by no means free from doubt, the difference between the position of United States Marshal and the Director of the Office of Rent Stabilization is apparent, and, as pointed out by Judge Danaher, the *Colpoys* case should not have been controlling here. Petitioner was the head of a constituent agency of the Economic Stabilization Administration and was operating pursuant to a very broad delegation of presidential authority. His agency supervised and enforced federal

[5] The effectiveness of the immunity is all but destroyed if the official has to subject himself to a trial, even though its outcome may be favorable to him. The purpose of the rule of absolute immunity is to cut off litigation entirely, or at the least to end it at its inception without the necessity of a trial going into the official's motives, reasons, and justification. It is precisely for this reason, as pointed out in the Statement, *supra*, pp. 7–8, that petitioner's appeal was limited to the defense of absolute immunity; all the other defenses available to him would have resulted merely in a new trial, with its burdens and the possibility of increased awards by a new jury. Similarly, from the Government's viewpoint, the rule of absolute immunity is the only satisfactory solution. Qualified privilege always allows the plaintiff to seek to prove—through a trial and examination of witnesses—that the defendant acted through malice or other improper motive; rather than avoiding a full trial, the defense of qualified privilege invites one.

rent control. All powers, duties, and functions conferred on the President by Title II of the Housing and Rent Act of 1947 were delegated to the Director of the Office of Rent Stabilization by the Economic Stabilization Administrator, and "[t]he aforementioned delegation of authority [reflected] the Administrator's policy to delegate to constituent agencies operating authority to the fullest practicable extent consistent with his ultimate responsibility for the conduct of the Agency's activities in a reasonable and efficient manner.". 16 Fed. Reg. 7630. Of course, petitioner had full responsibility for the internal management of the agency with its several thousand employees and, like all heads of executive departments and agencies, was answerable to the President and Congress in regard to the administration of the agency's policies. The issuance of press releases was a regular practice of the Office of Rent Stabilization. See Rourke, *Law Enforcement Through Publicity*, 24 U. Chic. L. R. 225, 233 (1957). The circumstances which prompted the issuance of the press release, as outlined *supra*, at pp. 4–5, make it clear that petitioner was within the general scope of his official authority in giving full publicity to the entire affair. Petitioner's situation was no different, in any respect, from that of the heads of similar agencies or other comparable officers. There can thus be no doubt that the decision of the court below rests entirely on the undisputed fact that petitioner was not a Cabinet member and did not hold a position like that of a Cabinet officer; the square ruling is that all such officials are unprotected by the rule of absolute immunity.

But the rationale of the rule of immunity applies with equal force to lesser officials who hold policy-making or "political" positions. They, too, should be free to explain their acts and policies to the public without fear of defamation charges resulting from their public statements. Vigorous performance of duties untrammeled by the fear of retaliation by private damage actions necessitates the existence of the privilege. Public explanation of his actions should be considered as much a part of petitioner's duties as the taking of the action itself. The situation in the instant case was very similar to that in *Mellon* v. *Brewer, supra,* where a press release by the Secretary of the Treasury, designed to offset adverse publicity to his department and the impairment of public confidence, was held to be absolutely privileged. Whether or not the author of the defamation is a cabinet officer should not be controlling, for the policy of free disclosure and discussion of facts by public officials is equally present and has long been followed by high officials who do not hold cabinet rank.

The interest of the public, which is the recipient of the communication, is disregarded by the decision of the Court of Appeals. Press releases and press conferences have, of course, become an important and accepted phase of governmental operations. The result of the decision, if allowed to stand, will probably be a sharp restriction on an important source of information for the press (see editorial, The Washington Post, June 10, 1957, p. A12, col. 1.) and, in turn, a curtailment of information which the public is en-

titled to and should receive about controversial matters. For there can be little doubt that the decision below by the court whose rulings govern at the seat of government—with its outright denial of absolute privilege to all officials below cabinet status and its express reservation of decision even as to "officers whose positions are comparable to those of Cabinet officers" (App., *infra*, pp. 26–27)—will have a wide application and a broad effect.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
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Attorneys.

SEPTEMBER 1957.

436122—57——2

APPENDIX

In the United States Court of Appeals for the District of Columbia Circuit

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Appeals from the United States District Court for the District of Columbia

Decided May 2, 1957

Mr. Paul A. Sweeney, Attorney, Department of Justice, with whom *Assistant Attorney General Doub* and *Messrs. Oliver Gasch,* United States Attorney, and *Joseph Langbart,* Attorney, Department of Justice, were on the brief, for appellant.

Mr. Byron N. Scott, with whom *Mr. Richard A. Mehler* was on the brief, for appellees.

Before EDGERTON, *Chief Judge,* and FAHY and DANAHER, *Circuit Judges*

EDGERTON, *Chief Judge*: In 1953 the defendant Barr was Acting Director of the Office of Rent Stabi-

lization, a branch of the Economic Stabilization Agency. The head of the Agency was the Director of Economic Stabilization. The plaintiffs Madigan and Matteo were employees in the Office of which the defendant was Acting Director. A terminal-leave plan which the plaintiffs had sponsored in 1950 was under criticism in Congress in 1953. The defendant had disapproved of the plan. Without his knowledge, his secretary signed the defendant's name to a letter to a Senator defending the plan. The plaintiff Madigan had drafted the letter. When the defendant learned that the letter had gone out over his signature, he issued a press release in which he said his first act of duty would be to suspend the plaintiffs, the officials responsible for the terminal-leave plan, and that although he "was advised" the plan was legal, he thought it "violated the spirit of the Thomas Amendment" and he "violently opposed it".

The plaintiffs sued the defendant for libel. The verdict and judgment were for the plaintiffs. The defendant appeals on the ground that he had an "absolute immunity or privilege" in publishing the press release.

We agree with the District Court in overruling that contention. The defendant's decision to suspend the plaintiffs for what he thought, mistakenly or not, was sufficient cause, and his execution of any documents appropriate to that end, were probably within his general line of duty. If so, a letter to his official superiors explaining his decision would also have been within his general line of duty. *Cf. Farr* v. *Valentine*, 38 App. D. C. 413. So would an explanation addressed to the plaintiffs or to their representative. *Newbury* v. *Love*, —— U. S. App. D. C. ——, —— F. 2d —— (Feb. 28, 1957). But in explaining his decision to the general public, the defendant went

entirely outside his line of duty. If such an officer were to do such a thing in bad faith or with a bad motive, no sufficient public interest would require that he be protected. If the defendant had been a Cabinet officer, his public explanation might have been absolutely privileged. "It has been held that a Cabinet officer is absolutely privileged to publish defamation, not only in doing his duty but also in discussing it; his defamation, to be protected, need only have 'more or less connection with the general matters committed by law to his control or supervision'." But this is because "Cabinet officers have political functions, and public interest is thought to require that they be not restrained by fear of libel suits from publicly explaining their acts and policies." *Colpoys* v. *Gates*, 73 App. D. C. 193, 194, 118 F. 2d 16, 17.* We held in that case that a United States Marshal was not absolutely privileged to defame his subordinates in publicly explaining his reasons for dismissing them. Neither, we think, was an Acting Director of the Office of Rent Stabilization.

In general, "When the author of a libel writes under the compulsion of a legal or moral duty, or for the protection of his own rights or interests, that which he writes is a privileged communication unless the writer be actuated by malice." *Dickins* v. *Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, 84 U. S. App. D. C. 51, 54, 171 F. 2d 21, 24. In the District Court the defendant Barr claimed that if his press release was not absolutely privileged, it was qualifiedly privileged by reason of this principle. However, on this appeal he has waived this claim. His brief states the "Question Presented" as follows: "Whether the Acting Director of the Office of Rent Stabilization should be ac-

[*The opinion was later modified at this point. See pp. 26-27, *infra*.]

corded absolute immunity in a suit for libel for allegedly defamatory statements made by him in a press release, issued on Thursday, February 5, 1953, announcing his intention to suspend two named employees of the agency on Monday, February 9, 1953, and setting forth his reasons for taking that action." The entire "Statement of Points" in his brief is as follows: "The District Court erred in denying the defendant's respective motions to dismiss and for a directed verdict which were based on the defense of absolute immunity or privilege."

The waiver of the claim of qualified privilege was informed and deliberate. The appellant was represented by eminent counsel. An Assistant Attorney General of the United States, the United States Attorney for the District of Columbia, and two attorneys of the Department of Justice, all signed appellant's brief. All have now filed a memorandum which contains this summary of the matter: "Appellant's brief, in conformity with Rule 17 (c) (7), set forth in the Statement of Points only the contention that the District Court erred in denying appellant's respective motions based on the defense of absolute immunity or privilege. Similarly, the Question Presented posed only this question, and the brief discusses this case only in terms of the applicability of absolute immunity as a defense. Finally, counsel for appellant, on October 12, 1956, disclaimed in open court any intent to urge any error on the part of the District Court other than its failure to accord to appellant the defense of absolute immunity or privilege."

This court's Rule 17 (c) (7) requires that appellant's brief state "the points on which appellant intends to rely". Rule 17 (f) provides that "Points not presented according to the rules of the court, will be disregarded, though the court, at its option, may

notice and pass upon a plain error not pointed out or relied upon." This exception for "plain error" protects our authority to deal, in the interest of justice, with a point counsel have overlooked. In the absence of extraordinary circumstances the exception should not be applied, in a civil case, to a point that eminent counsel, for strategic or other reasons, have deliberately chosen to waive. Accordingly we do not consider whether there was plain error in the District Court's rejection of the claim of qualified privilege.

Affirmed.

DANAHER, *Circuit Judge, dissenting:* Appellant was the duly appointed Acting Director of the Office of Rent Stabilization at the time of the alleged libel. "All powers, duties and functions conferred on the President by Title II of the Housing and Rent Act of 1947, exclusive of section 208 (a), as amended, and delegated to the Economic Stabilization Administrator by Executive Order No. 10276, shall be exercised and performed by the Director of Rent Stabilization pursuant to Executive Order No. 10276 and except as otherwise provided by this order."[1]

The declaration of policy of such an executive, as contained in the challenged press release, seems to me to be absolutely privileged. The appellant, exercising by redelegation the President's own powers, was entitled to immunity.[2] The official act was within the scope of those powers. The occasion was such as jus-

[1] Sec. 4 of GO 9—Organization for Rent Stabilization, 16 FED. REG. 7630.

[2] *DeArnaud* v. *Ainsworth*, 24 App. D. C. 167, 178 (D. C. Cir. 1904); *Glass* v. *Ickes*, 73 App. D. C. 3, 117 F. 2d 273 (D. C. Cir. 1940), *cert denied*, 311 U. S. 718 (1941); *Mellon* v. *Brewer*, 57 App. D. C. 126, 18 F. 2d 168 (D. C. Cir. 1927), *cert. denied*, 275 U. S. 530 (1927); cf. *Gregoire* v. *Biddle*, 177 F. 2d 579 (2d Cir. 1949), *cert. denied*, 339 U. S. 949 (1950).

tified his action. The subject of the release dealt specifically with general matters committed by law to his control or supervision.

Appellee Madigan had been Deputy Housing Expediter in charge of personnel budget and fiscal matters within the agency. Appellee Matteo had been responsible for all technical aspects of the personnel program including recruiting and classification, and had been adviser to the deputy for administration on procedures or policy matters. Mr. Madigan devised a plan, in which both appellees joined, whereby they "terminated themselves one day as permanent employees; received their lump sum accumulated annual leave; were rehired the next day; continued as temporary employees, with the intent to convert back to permanent employees at a later date." Appellant's intra-agency opposition to the plan was known.

Members of Congress publicly attacked the plan. Earlier criticism had been crystallized in the Thomas Amendment.[3] Appellant told appellees on February 5, 1953 "that the plan had become public, the agency was being bombarded with questions from newspapers and other forms of public media, that the agency was being subjected to severe criticism and that in order to protect the good name of the agency and myself I had to take disciplinary action against an act which I deemed improper."

Appellee Madigan two days earlier had prepared a letter to Senator Williams defending the plan. He did not attempt to see appellant about it, but for-

[3] § 1212, General Appropriations Act, 1951, 64 STAT. 768, provided in part: "No part of the funds of, or available for expenditure by any corporation or agency included in this Act * * * shall be available to pay for annual leave accumulated by any civilian officer or employee during the calendar year 1950 and unused at the close of business on June 30, 1951 * * *."

warded the letter purporting to bear appellant's signature despite appellant's known opposition to the plan. Both appellees "took advantage" of the plan to use up the ear-marked funds.

Appellant testified that he decided to take disciplinary action "because I felt there was no defense for the plan and I had to protect the integrity of the agency and because of my personal position in the matter and the letter had been sent to Senator Williams without my knowledge."[4]

The defense of this case was conducted by the Department of Justice. In the District Court appellant's motion for directed verdict was based in part on the ground that "the press release was qualifiedly privileged." The suit in last analysis, I take it, may be viewed as one against the Government which undoubtedly through Congress will be asked to respond to the judgment. I doubt that Government attorneys possess the power to waive a defense which, if it had been asserted, might have prevailed here. Compare our opinion in No. 13245—*Newbury* v. *Love*, decided February 28, 1957, where we found absolute privilege, despite *Colpoys* v. *Gates*.[5]

I see no obstacle in the *Colpoys* case to the result which I believe is required here. The limited functions of a marshal in publishing a statement in connection with the resignation of two deputies are not to be confounded with a situation such as the instant case presents. Even in *Colpoys* we recognized that officers with policy-determining functions are in a different category, and privilege is shown to have been accorded to acts in the general line of duty.

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[4] Cf. *Dickens* v. *International Brotherhood, Etc.*, 84 U. S. App. D. C. 51, 171 F. 2d 21 (D. C. Cir. 1948).

[5] 73 App. D. C. 193, 118 F. 2d 16 (D. C. Cir. 1941).

To recapitulate: here the Acting Director's status and authority stemmed from the President himself. His Executive Order made this agency head, in his own division, a policymaker second only to the Economic Stabilization Director. Involved, as a matter of top interest, was a policy position with reference to a plan admittedly devised to "use up" $2,600,000 of public funds which had been earmarked for terminal leave. If the appellant thought the Madigan plan had been a perversion of an appropriation to ends beyond the intention of Congress in providing the funds, it was his duty to speak out. He was not alone in his appraisal of the untoward result. His press release did no more than seek to allay the serious challenge to the integrity of the agency and to attempt to restore a public confidence which the use of the plan had impaired. The subject matter was personal to him because his name had without authorization been affixed to an official letter which misrepresented his position. The whole congeries of occurrences, including the position the Acting Director intended to take with reference to the problem, became of vital concern to the public. Under such circumstances, the press release was entitled to the status of privilege.

We need not, indeed I do not seek to, relax the rule which regards a cabinet officer as "absolutely privileged to publish defamation, not only in doing his duty but also in discussing it; his defamation, to be protected, need only have 'more or less connection with the general matters committeed by law to his control or supervision,'"* I think we should hold only that this officer, on the facts here disclosed,

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* *Colpoys* v. *Gates*, *supra* note 5, 73 App. D. C. at 194, 118 F. 2d at 17, citing *Spalding* v. *Vilas*, 161 U. S. 483, 498 (1896).

acting in the name of the President and exercising, by redelegation, powers conferred upon him by statute, and possessed of policy-making functions, is immune on account of a policy statement issued within the scope of his authority as to a matter committed by law to his control.

In this view, I think the judgment should be reversed.

In the United States Court of Appeals for the District of Columbia Circuit

April Term, 1957. *C. A. 3221–53*

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE.

April Term, 1957. *C. A. 3221–53*

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Appeals from the United States District Court for the District of Columbia

Before EDGERTON, *Chief Judge*, and FAHY and DANAHER, *Circuit Judges*

JUDGMENT

These appeals came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the order of the said District Court appealed from in these cases be, and it is hereby, affirmed.

It is further ORDERED by the Court that each party in these cases shall bear his own costs on these appeals.

Dated: May 2, 1957.

Per Chief Judge EDGERTON.

Separate dissenting opinion by Circuit Judge DANAHER.

In the United States Court of Appeals for the District of Columbia Circuit

April Term, 1957

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Before EDGERTON, *Chief Judge,* and FAHY, in Chambers

ORDER

It is ORDERED by the Court that the opinion of this Court in the above cases be modified by striking the following words beginning on the fifteenth line of the third page:

"We held in that case"

and by inserting in lieu thereof the following words:

"We do not suggest that this principle is limited to Cabinet officers. We have no present occasion to consider whether it would apply, *e. g.,* to the Director of Economic Stabilization, who was appellant's official superior, or to the Chairman of the Atomic Energy Commission,

or to other officers whose positions are comparable to those of Cabinet officers. Appellant's position was not of that sort. We held in *Colpoys*"

Per Curiam.

Dated: June 6, 1957.

In the United States Court of Appeals for the District of Columbia Circuit

April Term, 1957

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Before EDGERTON, *Chief Judge*, PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges*, in Chambers

ORDER

Upon consideration of appellant's petition for a rehearing in banc, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: June 6, 1957.

Circuit Judges WASHINGTON, BASTIAN, and BURGER did not participate in the foregoing order.

Circuit Judge MILLER would grant the petition.

U. S. GOVERNMENT PRINTING OFFICE 1957